National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 22, 1995

TO: John D. Nelson, Regional Director, Region 19

FROM: Robert E. Allen, Associate General Counsel, Division of Advice

SUBJECT: Electronic Data Systems, Inc., Case 36-CA-7434

506-2050, 512-5012-3322, 512-5012-6718, 512-5036-3300, 512-7550-6000

This Section 8(a)(3) case was submitted for advice on whether an employee was unlawfully discharged for discussing her work performance evaluation over the Employer's electronic mail (e-mail) system.

In September 1993, Charging Party employee Tsing sent e-mail to her fellow employees and supervisors discussing her recently received below average work performance evaluation. When the Employer warned Tsing that she could be discharged for using e-mail for that purpose, Tsing sent another e-mail message concerning that threat. The Employer then issued Tsing a written warning against improper use of e-mail for nonbusiness purposes.

Around one year later, in August 1994, Tsing sent e-mail to her supervisor and to other project managers attempting to explain why her current project was late. In this e-mail, Tsing made comments about the evaluation she had received on this project. Tsing and her supervisor then exchanged e-mail over where blame should be placed for the project delay. Shortly thereafter, an Employer manager informed Tsing that the Employer had decided to discharge her for revealing confidential information concerning her evaluation to her work peers. In a later statement to the state unemployment office, the Employer stated that it discharged Tsing because she had used e-mail to communicate confidential information concerning her performance to her peers, and that such information should be kept between the manager and employee.(1)

The Employer admits that it had a rule prohibiting employees from discussing their salaries or performance evaluations with other employees. Although the Employer claims that it no longer has such a rule, it provided no evidence of when the rule was eliminated, or whether and when any employees were advised of its elimination. Tsing states that when she was initially trained, she was advised of the rule against discussing salaries and evaluations. Tsing further states that she has never been told by the Employer that it no longer has that policy.

We conclude that the Employer unlawfully discharged Tsing for discussing her performance and prior evaluation with other employees.(2) We note that an Employer manager contemporaneously gave this reason as the basis for Tsing's discharge. This unlawful basis for the discharge is further demonstrated by the fact that the Employer one year earlier retaliated against Tsing for this same protected conduct. In addition, the Employer has long had a specific rule prohibiting such Section 7 activity, and has not shown that it had effectively revoked that rule.

We noted that Tsing's August 1994 e-mail may not have been sent to any fellow employees. The fact that Tsing in fact may not have engaged in this Section 7 activity is immaterial where, as here, the Employer clearly made this activity the stated basis for the discharge. It is well settled that when an employee is disciplined for concerted or union activities which his employer mistakenly believes he had participated in, the employer thereby violates the Act.(3)

We would argue that the Employer's later provided basis for the discharge, viz., Tsing's "misuse" of the Employer's e-mail, is pretextual. First, the Employer only later provided that reason after it first and contemporaneously provided the unlawful reason. Second, the Employer admits that at least two other employees have used e-mail for personal reasons, albeit not Section 7 reasons. The Employer warned but did not discharge these employees. Thus, the Employer did not retaliate against Tsing because of her "misuse" of its e-mail, but rather because the Employer believed, perhaps mistakenly, that Tsing was

discussing her performance evaluation with other employees.

Finally, we would not argue that the discharge was unlawful as pursuant to an unlawfully broad rule, viz., the rule against using e-mail to discuss nonbusiness matters, including Section 7 matters. It is well settled that an employer may restrict and regulate employee use of company property.(4) We therefore conclude the Employer could have lawfully restricted employee use of its e-mail system to only business purposes.

R.E.A.

---

[1] Despite the Employer's repeated stated basis for discharging Tsing, i.e., sending e-mail to her peers, Tsing's August 1994 e-mail had been sent only to her supervisor and other project managers.

[2] Employer prohibitions against employee discussions of terms and conditions of employment are unlawful. See, e.g., Leather Center, Inc., 312 NLRB 521 (1993); cf. International Business Machines, 265 NLRB 638 (1982).

[3] Gulf-Wandes Corp., 233 NLRB 772, 778 (1977), citing Henning and Cheadle, Inc., 212 NLRB 776 (1974).

[4] See, e.g., Bon Marche, 308 NLRB 184 (1992)(employer bulletin boards); Champion International Corp., 303 NLRB 102 (1991) (copying machine).